(2)

No. 94-190

FILED
SEP 30 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

ALVA Z. McGRATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JEFFERY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Major, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20374-1111

BEST AVAILABLE COPY

13 pp

QUESTION PRESENTED

Whether a military judge properly admitted a child abuse victim's out-of-court statements under a residual hearsay exception, after the victim refused to testify at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

California v. *Green*, 399 U.S. 149 (1970)	7
Idaho v. *Wright*, 497 U.S. 805 (1990)	5, 9
Ohio v. *Roberts*, 448 U.S. 56 (1980)	6, 7
United States v. *Inadi*, 475 U.S. 387 (1986)	6
United States v. *Ortiz*, 35 M.J. 391 (C.M.A. 1992)	7

Constitution, treaty, statutes and rules:

U.S. Const.:	
Amend. V	8
Amend. VI (Confrontation Clause)	5, 6, 9
Status of Forces in Germany, Aug. 3, 1959, 481 U.N.T.S. 262	7
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 120, 10 U.S.C. 920	2
Art. 125, 10 U.S.C. 925	2
Art. 134, 10 U.S.C. 934	2
Mil. R. Evid.:	
Rule 804(a)(2)	4, 8
Rule 804(b)(5)	4, 5
Idaho R. Evid. 803(24)	6

Miscellaneous:

U.S. Air Forces in Europe Pamphlet 30-16 (1984)	8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-190

ALVA Z. MCGRATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-35a) is reported at 39 M.J. 158. The opinion of the Air Force Court of Military Review (Pet. App. 36a-49a) is unreported.

JURISDICTION

The decision of the Court of Military Appeals was entered on May 6, 1994. The petition for a writ of certiorari was filed on August 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted by a general court-martial, the military judge sitting alone, of carnal knowledge, sodomy, and indecent acts with his 14-year-old daughter, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 920, 925, and 934. He was sentenced to a dishonorable discharge, confinement for 120 months, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review modified the findings and sentence and affirmed. Pet. App. 36a-49a. The Court of Military Appeals granted discretionary review and affirmed the judgment of the Air Force Court of Military Review. *Id.* at 1a-22a.

1. On June 9, 1989, petitioner's 14-year-old daughter (whom we identify as A.M.) told a school counselor that she had been sexually abused by petitioner, her natural father. The counselor notified the Mental Health Clinic at Hahn Air Base, Federal Republic of Germany, the Air Force Office of Special Investigations (OSI), and the base legal office of those allegations. OSI Special Agent Kenneth Sallinger and Ms. Leann Steinbach, a German national associated with the OSI, took A.M. to the Mental Health Clinic, where they were joined by Captain Timothy Friesen, a staff psychologist who had had previous contact with the victim. Also present were Captain Deborah Hall, an attorney with extensive experience in prosecuting child abuse cases, and Sergeant Donitta Gardiner, a technician assigned to the Mental Health Clinic who already knew the victim. 2 R. 54-58, 78-82; 3 R. 171.

A.M. talked in general terms about the allegations, but she became increasingly embarrassed and uncom-

fortable. Captain Friesen and Agent Sallinger left, while Captain Hall continued the interview. Captain Hall was not aware of what specific allegations had been made and did not offer suggestions to the victim as to what might have happened. A.M. demonstrated petitioner's actions using anatomically correct dolls. She appeared embarrassed and slightly upset, but remained in control during the interview, which lasted between 30 minutes and an hour. Following the interview, Captain Hall and Agent Sallinger took A.M. to the OSI offices, where the victim repeated her statement and Captain Hall typed it on a computer. A.M. sat next to Captain Hall while she typed, making corrections and additions. A.M. read the completed statement from the computer screen, read it again after it was printed, and signed it under oath. She did not recant or retract any of the statements made during the interview at the Mental Health Clinic. She understood the words used in the statement, including specific sexual terms, and appeared to understand the oath that she took prior to signing the statement. 2 R. 56-63, 69.

On June 20, 1989, A.M. returned to the OSI office and told Agent Sallinger that she had more information about her prior allegations and about other acts of her father. Agent Sallinger followed the same dictation process that Captain Hall had used to reduce the victim's statement to writing. A.M. appeared a "little bit nervous" but was in control at that time. She proofread the statement as it was being typed and made corrections. Agent Sallinger did not offer suggestions or make any corrections other than those requested by the victim. A.M. read the printed statement, took another oath, and signed the statement without hesitation. The meeting lasted approximately an hour. 2 R. 98-102, 109.

2. The prosecution called A.M. as a witness at petitioner's trial. She testified that she was 14 years old and was petitioner's daughter. When asked about the allegations and the statements she provided, she refused to answer. A.M. acknowledged that she was present at trial pursuant to an order from German civil authorities, but she stated that she had no intention of testifying against her father and she repeatedly replied "I refuse to answer that" when questioned about the abuse. A.M. acknowledged the importance of the oath she took prior to testifying and in connection with each of the statements, and she specifically denied lying under oath in her prior statements. The military judge explained to the victim the importance of her testimony and of resolving the allegations against her father. A.M. steadfastly refused to testify, explaining that she did not want her father to go to jail. 2 R. 19-25, 40-49.

The prosecution sought to admit A.M.'s out-of-court statements under Mil. R. Evid. 804(b)(5), the residual hearsay exception for statements by unavailable declarants. The military judge found that the victim was unavailable under Mil. R. Evid. 804(a)(2). 2 R. 52. He then heard testimony from Captain Hall and Agent Sallinger concerning the circumstances under which the statements were made. 2 R. 53-127. Defense counsel objected to the admission of the statements and offered the testimony of four witnesses to impeach the reliability of those statements. 2 R. 128, 148; 3 R. 149-164, 168-195. At the conclusion of the hearing, the military judge concluded that the victim's statements were admissible under Mil. R. Evid. 804(b)(5). 3 R. 211.

The court specifically found that (1) the statements were made by the victim; (2) the statements were evidence of material facts in the case pertaining to the allegations of sexual misconduct; (3) the statements

were more probative on the issue of whether sexual misconduct occurred than any other evidence that the government could procure through reasonable means; (4) because the victim had refused to testify, the statements were the only form in which the victim's allegations could have been presented to the court; and (5) the general purposes of the Military Rules of Evidence and the interests of justice would be served by admission of the victim's statements. The military judge thereafter admitted petitioner's confession, finding that it was voluntary and sufficiently corroborated by A.M.'s out-of-court statements. 3 R. 211-214, 218-219. See Pet. App. 22a-26a (excerpts of the military judge's ruling).

3. The Air Force Court of Military Review ruled that A.M.'s out-of-court statements were properly admitted under Mil. R. Evid. 804(b)(5). Pet. App. 40a-46a. The Court of Military Appeals agreed and specifically rejected petitioner's contention that the admission of those statements violated petitioner's rights under the Sixth Amendment's Confrontation Clause. See *id.* at 9a-22a. The Court of Military Appeals explained that although A.M. was unwilling to testify at trial on behalf of the prosecution, petitioner could have cross-examined A.M. about her out-of-court statements, but he waived that opportunity at trial. *Id.* at 13a-14a.

ARGUMENT

1. Petitioner contends (Pet. 8-10) that the Court should review this case to decide whether a court must find that a witness is unavailable before it can apply the Confrontation Clause analysis set out in *Idaho* v. *Wright*, 497 U.S. 805 (1990). That issue is not presented here, because the lower courts concluded that the declarant was unavailable as a witness for the prosecution in this case.

In *Wright*, the Court held the admission of a child's out-of-court statements under an Idaho residual hearsay exception, Idaho R. Evid. 803(24), violated the Confrontation Clause. The Court noted that in "the usual case" the Confrontation Clause requires the prosecution to "produce, or demonstrate the unavailability of, the declarant" before using a hearsay statement against the defendant. 497 U.S. at 814 (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980)). But the Court also noted that there are exceptions to that general rule. 497 U.S. at 815. For example, the Court held in *United States* v. *Inadi*, 475 U.S. 387, 394-400 (1986), that the prosecution does not need to show unavailability before admitting the out-of-court statements of a non-testifying co-conspirator. See 497 U.S. at 815. The Court did not resolve whether the prosecution needed to show whether the child in *Wright* was unavailable, see *id.* at 816, holding that the child's out-of-court statements were inadmissible in any event because they lacked sufficient indicia of reliability, *id.* at 816-827.

Petitioner correctly notes that the Court left open whether the Confrontation Clause requires the prosecution to show that a declarant is "unavailable" before invoking a residual hearsay exception. That issue, however, is not squarely presented here, because the lower courts concluded that A.M. was "unavailable" in the sense that she refused to testify on the prosecution's behalf. 2 R. 52. The military judge specifically noted that "considering the refusal of [A.M.] to testify in this case, the [out-of-court] statements are the only form in which the victim's allegations can be presented to the court." Pet. App. 23a. The Air Force Court of Military Review concluded that "the trial judge was correct in taking [A.M.] at her word that she would not testify, and finding her 'unavailable' within the meaning of the

residual hearsay exception." *Id.* at 43a. Hence, the question left open in *Wright*—whether the prosecution may obtain admission of hearsay from an available declarant under a residual hearsay exception—was not decided and is not presented in this case.

2. Petitioner contends (Pet. 10-14) that this Court should determine whether "a witness' appearance solely to announce her refusal to testify constitutes unavailability for purposes of the Confrontation Clause." This Court has already made clear, however, that the question of whether a witness is "unavailable" is determined through a practical assessment of the facts in the particular case. As the Court explained in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), a declarant should be considered unavailable only after the prosecution has "made a *good-faith effort* to obtain his presence at trial." *Id.* at 74. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ibid.* (quoting *California* v. *Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring)). Accord *United States* v. *Ortiz*, 35 M.J. 391, 393 (C.M.A. 1992) ("[t]he extent of this good-faith effort is defined by a reasonableness standard, because the Court also held that '[t]he law does not require the doing of a futile act'" (quoting *Roberts*, 448 U.S. at 74)).

The courts below correctly concluded that A.M. was unavailable as a witness for the prosecution. At trial, the prosecution had utilized the Status of Forces in Germany agreement under the North Atlantic Treaty Organization, Aug. 3, 1959, 481 U.N.T.S. 262, to obtain a subpoena from the Federal Republic of Germany to secure the victim's presence at trial. 2 R. 26; 4 R. App. Exh. VI. The subpoena directed A.M. to appear at the court-martial proceeding, but did not require her to testify, and petitioner's defense counsel argued that

under German law A.M. could not be compelled to testify against her father. 2 R. 26-27 (citing U.S. Air Forces in Europe Pamphlet 30-16 (1984) (4. R. App. Exh. VII). The prosecutor agreed that the military judge had no way of enforcing an order requiring a civilian residing in Germany to testify in the military proceeding. See also 2 R. 27-33.

The military judge did not explicitly resolve whether he could compel A.M. to testify, but at the prosecutor's request—and over defense counsel's objection—he attempted to use "moral persuasion" to convince her to testify. 2 R. 33-40. Despite a lengthy colloquy with the military judge, A.M. refused to provide any testimony that would incriminate her father. 2 R. 40-49. At the conclusion of the colloquy, the judge expressed doubt that he could enforce an order requiring A.M. to testify, and the judge accordingly concluded that she was unavailable as a witness within the meaning of Mil. R. Evid. 804(a)(2). See 2 R. 49-52.

As the courts below concluded, the prosecution made an adequate "good faith effort" to obtain A.M.'s testimony. The prosecution secured her presence at trial through a subpoena issued by the host country, and it encouraged the military judge to use the tools reasonably at his disposal to induce her to testify. See Pet. App. 43a. As petitioner concedes, the lower courts have found that witnesses are "unavailable" in the analogous situation where they invoke a Fifth Amendment privilege. See Pet. 13. Petitioner suggests that this Court's review is warranted because "[t]he facts in petitioner's case do not fit squarely" into any of those cases. Pet. 13-14. The factual situation here, however, does not "fit squarely" within any previous case, because this case is quite unusual. But rather than providing a reason for this Court's review, the unusual nature of

this case counsels against review, because the case does not present a question of general importance.

In any event, petitioner cannot fairly claim that his rights under the Confrontation Clause were compromised by A.M.'s refusal to testify. Although A.M. was unwilling to testify as a witness for the prosecution, she did appear in court and was available for the defense to examine with respect to her out-of-court statements. As the Court of Military Appeals concluded, petitioner waived that opportunity to cross-examine her. Pet. App. 13a. "Having thus eschewed confrontation, [petitioner] cannot now claim a denial of it." *Id.* at 14a.

3. Petitioner also contends (Pet. 14-19) that review is warranted "because lower courts have become entangled in the legal morass created by the overlap of the hearsay rule and confrontation rights." We submit that no such "morass" exists. This Court's decision in *Wright* established a framework for evaluating whether evidence offered under a residual hearsay rule has particularized guarantees of trustworthiness. See 497 U.S. at 820-825. Petitioner suggests that the Court's decision in *Wright* departed from the then-prevailing practice. Pet. 17. As petitioner acknowledges, however, the courts of appeals have been consistent in their interpretation and application of the *Wright* decision. Pet. 17-18. Thus, there is no need at this time for the Court to revisit that area of the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JEFFERY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Major, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division

SEPTEMBER 1994